

Biton v State Farm Ins. Co.

2008 NY Slip Op 30340(U)

February 5, 2008

Supreme Court, New York County

Docket Number: 0601732/2002

Judge: Walter Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER D. TOLUB
Justice

PART 15

Index Number : 601732/2002

BITON, CRYSTAL

vs.

STATE FARM INSURANCE

SEQUENCE NUMBER : 015

REARGUE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for _____

PAPERS NUMBERED

bits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

FEB 07 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/8/08

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate

DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----X
CRYSTAL BITON and DANIELLE BITON

Plaintiffs,

Index No. 601732/02
Mtn Seq. 015

-against-

STATE FARM INSURANCE COMPANY, NEW YORK CITY
TRANSIT AUTHORITY, DANNA EQUIPMENT CORP.,
STONEWALL CONTRACTING INC. And NINE NORTH
MOORE STREET CONDOMINIUM,

Defendants.

FILED

FEB 07 2008

-----X
WALTER B. TOLUB, J.:

NEW YORK
COUNTY CLERK'S OFFICE

By this motion Plaintiffs seek to renew and reargue this court's July 24, 2007 decision which precluded Plaintiffs from offering testimony or evidence relative to their claims for property damage. Plaintiffs' motion is denied.

Facts

This is an action for property damage and personal injury due to exposure to mold. As stated in this court's July 24, 2007 decision, on February 5, 2002 Plaintiffs claim that they sustained over \$383,473 in property damage when water entered into the basement level of their two-level condominium. Plaintiffs claim that the bulk of the damage sustained was due to water damage to thousands of items of new clothing which had been purchased by the Plaintiffs with the intent of opening a clothing store.

At some point after February 5, 2002, Plaintiffs filed an

insurance claim with Defendant State Farm Insurance Company ("State Farm") and retained Biagio Tripodi to adjust their claim in exchange for somewhere between 10 to 12% of the total recovery in this action. Mr. Tripodi notified Defendant State Farm of his retention by the Plaintiffs on February 27, 2002.

From the testimony that was submitted on the motion that Plaintiffs now seek to reargue, Mr. Tripodi never saw the contents or condition of Plaintiffs' basement. Rather, he hired one Thomas Andropoli to perform the task of inventorying the contents of Plaintiffs' basement. Although Mr. Andropoli spent four days "inventorying" the contents of Plaintiffs' basement, the inventory report he produced only records items in generic terms and does not contain any information identifying the makers of the alleged destroyed clothing items. Mr. Andropoli further stated at the deposition that 50% of the values assigned to the destroyed property were given to him by Plaintiff Crystal Biton. No photographs were submitted by Plaintiffs of any of the actual contents of the basement. No receipts, price tags or labels of the garments were submitted. All of the items from the apartment were removed and thrown away.

On May 8, 2002, Plaintiffs commenced the underlying action asserting nine causes of action against the Defendants including claims for property damage and for injuries predicated upon exposure to mold. Defendants filed motions *in limine* which were

decided by this court on July 24, 2007. After reviewing all of the papers submitted, this court held, inter alia, that Plaintiffs were precluded from offering any testimony or evidence relative to their claims for property damage on the grounds that Plaintiffs willingly and knowingly destroyed evidence regarding their damages. Plaintiffs now seek to renew and reargue that portion of this court's July 24, 2007 decision.

Discussion

Motion to Renew

A motion for leave to renew must be (1) based upon new facts not offered on the prior motion that would change the prior determination and (2) set forth a reasonable justification for the failure to present such facts on the prior motion. (CPLR §221(e)(2); Chelsea Piers Management v. Forest Elec. Corp., 281 Ad2d 252 [1st Dept 2001]). Here Plaintiffs have not supplied facts which were not available to them at the time the underlying motion was made. It follows that Plaintiffs' motion to renew is denied.

Here Plaintiffs opposed the original motion by submitting an affirmation from their attorney dated March 1, 2007. There were no exhibits or photographs attached to the affirmation. Plaintiffs did not argue that there were photograph of some of the clothing involved or discuss any of the testimony or exhibits from the previously dismissed defendant State Farm Insurance

Company.

Plaintiffs now attach photographs and State Farm Insurance depositions, neither was attached or even discussed in the underlying motion. The photographs were from Plaintiffs files. The State Farm depositions were taken almost 4 years ago. All of the "new" materials attached to this motion to renew and reargue were in Plaintiffs or Plaintiffs' counsel's possession when the motion for spoliation was made. Therefore, since Plaintiffs have not supplied facts which were not available to them at the time the underlying motion was made. It follows that Plaintiffs' motion to renew must be and is denied. (American Audio Service Bureau Inc. v. AT&T Corp., 33 AD3d 473 [1st Dept 2006]).

Motion to Reargue

As with any motion to reargue, success is predicated upon demonstrating that in arriving at its earlier decision, the court either overlooked or misapprehended the facts or the law or somehow mistakenly arrived at its conclusion. (CPLR §2221(d)(2); Foley v. Roche, 68 AD2d 558, 567 [1st Dept 1979]; Schneider v. Solowey, 141 AD2d 813 [2nd Dept 1988]; Pahl Equipment Corp. v. Kassis, 182 AD2d 22, 27 [1st Dept 1992]). The inquiry is strictly limited to the papers presented in the motion being reargued and is not to be used to allow an unsuccessful part to reargue questions that have been previously decided, or to advance different arguments not made on the original motion.

(Foley, 68 AD2d 558, 567 [1st Dept 1979]).

Here, Plaintiffs bring up new arguments and present documents that were not presented with the original motion, although they were in Plaintiffs' possession at the time that motion was made. Plaintiffs are not entitled to a second chance to make factual presentations and to expand the record. It follows that Plaintiffs' motion to reargue must be and is denied. (Foley, 68 AD2d 558, 567 [1st Dept 1979]).

Furthermore, the court notes that the improper submissions of documents and copies of photographs made by Ms. Biton personally, have no bearing on this motion for the same reasons stated above. Even if the court were to consider the submissions, the court has analyzed them and determined that they have no probative value.

Plaintiffs fail to set forth the elements necessary for renewal or reargument. Plaintiffs do not point to any fact or principle of law that this court overlooked or misapprehended. Plaintiffs do not point to new or additional facts that were unknown at the time of the original application. Since Plaintiffs fail to show that this court either overlooked or misapprehended relevant facts or misapplied controlling principles of law, the motion to renew and reargue is denied in its entirety.

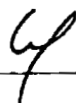
Accordingly it is

ORDERED that Plaintiffs' motion to renew and reargue is denied in its entirety.

Counsel for the parties are to appear for a status conference in this matter on February 29, 2008 at 11:00am in room 335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 2/1/08



HON. WALTER B. TOLUB, J.S.C.

FILED

FEB 07 2008

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COUNTY CLERK'S OFFICE